Supreme Court, U.S.
FILED
031063 JAN 20 2004
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In the United States Supreme Court

Docket Number _____

KEITH HOLLIS JONES
(Petitioner)

v.

FLOWSERVE FDC CORP; FLOWSERVE FSD CORP; FLOWSERVE INC. FORMERLY KNOWN AS DURIRON COMPANY INC; FLOWSERVE RED CORP
(Respondent)

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

Petition for Writ of Certiorari

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Questions Presented for Review

The court of appeal concluded that the trial court improperly struck the portion of the affidavit that established that there was a defective material selected for the bolts installed by the valve manufacturer, establishing proof of the first prong of La.Rev.Stat. § 9:2800.56. However, it concluded that the affidavit did not speak to the only other requirement under this statute, whether the potential for damage created by using stainless steel outweighed the attendant burden on Duriron and the adverse effect of the carbon steel on the valve's utility. Accordingly, the court below affirmed the grant of summary judgment. In reaching this conclusion, the court of appeal did not consider other evidence including the extensive deposition testimony, where plaintiff"s experts provided evidence of this additional element and gave

significantly more details about the bases for their opinions, the steps they undertook in forming those opinions and the things they relied upon; the remainder of the affidavit; the other affidavit submitted; and the relevant fact, as evidenced by the change in design, that "the putative benefits of Duriron's use of carbon steel bolting would have outweighed the benefits of using stainless steel". (Appendix, B-15)

Question: Whether the court below violated the mandates of this Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) by applying Federal Rules of Civil Procedure, Rule 56 to affirm the grant of summary judgment when the affidavit and expert deposition testimony established the defective design of a product and this same evidence, along with the fact

that the alternative design was already in use, established the feasibility of the alternative design -- thereby setting forth triable evidence of both prongs of the defective design claim?

Question: Whether in applying the summary judgment standard in this case the court below misconstrued this Court"s mandates in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), affirming the grant of summary judgment by reading the affidavit evidence in the abstract, rather than in the context of the entire record (including depositions), even though the entire record presented sufficient evidence to meet plaintiff"s burden at trial on the issue of defective

design?

Parties to the Proceeding

The Petitioner is Keith Jones, an individual domiciled in Calcasieu Parish, State of Louisiana. The Respondent is Flowserve Corporation, which owns and operates the company formerly known as The Duriron Company, Inc. The names "Durco," "Duriron" and "Flowserve", referred to in the record, all identify the same entity, and the names are used interchangeably.

PPG, Industries was the Intervenor in the case below but has failed to seek review of those rulings and is not before this Court. Counsel for the parties are as follows:

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Petition for Writ of Certiorari

Keith Hollis Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit (the Court of Appeals).

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished (other than in Westlaw and other unofficial reporters) and is entitled *Jones v. Flowserve FCD Corp.; Flowserve FSD Corp.; Flowserve, Inc., formerly known as Duriron Company, Inc.; Flowserve Red Corp.*, No. 02-30582; 73 Fed.Appx. 706, 2003 WL 22002606 (5th Cir. La.). Likewise the opinion denying a request for rehearing is also unpublished. The memorandum decision and order of the United States District Court for the Western District of Louisiana is also unreported and is entitled *Jones v. Flowserve*

FCD Corp.; Flowserve FSD Corp.; Flowserve, Inc., formerly known as Duriron Company, Inc.; Flowserve Red Corp., 99-CV-1621 (W.D. La.)

Jurisdictional Statement

In the trial court, jurisdiction was based on diversity of citizenship and an amount in controversy in excess of $75,000.00. Following the grant of summary judgment in favor of the Defendant/Respondent, a timely notice of appeal was filed on May 17, 2002. The Court of Appeals issued a decision affirming the trial court decision on August 21, 2003. Only the Petitioner filed for rehearing. That request for rehearing was denied on October 21, 2003. Within ninety (90) days of that denial, this Petition was filed before this Court, which has jurisdiction to hear the matter pursuant to 28 U.S.C. §§ 1254.

Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations

This case involves Rule 56 of the Federal Rules of Civil Procedure. The text of Rule 56 is set forth below:

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross- claim is asserted or a declaratory judgment is sought may, at any time, move with or without

supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under

this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal

knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or

attorney may be adjudged guilty of contempt.

Statement of the Case

Keith Hollis Jones was seriously injured on August 17, 1998 when he was sprayed with hot brine while employed with PPG in Lake Charles. This incident occurred when a Durco T-41 plug valve malfunctioned due to stress corrosion cracking ("SCC") in the stainless bolts holding the valve bonnet onto the valve body. The valve was manufactured between 1977 and 1983 by Duriron and sold to PPG for use in the manner and for the purpose that it was being used by Keith Jones on date of the incident. Not only was Duriron aware of the use for the valve when it was purchased by PPG, the evidence established that Duriron officials observed the valves in operation. After the manufacture of the instant valve but before this incident, Duriron changed the bolts being used to

secure the bonnet to carbon steel, a material less likely to suffer from SCC. Duriron did not provide PPG and its other customers with notice of the change or the reason for the change. The only indication of the change to carbon steel was a non-conspicuous change of the parts list in sales brochure. The parts list in the catalog simply stopped listing the "bonnet bolts" as being made from stainless steel and showed them as being made from carbon steel.

The issues in this Petition do not focus on the proper application of the Louisiana products liability act. There were two claims presented in the Court of Appeals, a defective design claim and a failure to warn claim. The Court of Appeals, properly stated the law applicable to both of these claims. As to the defective design claim, the court stated:

To recover under the LPLA, a product is "unreasonably

> dangerous in design" if: (1) an alternative design existed; and (2) "[t]he likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect ... of such alternative design on the utility of the product." La.Rev.Stat. §§ 9:2800.56.

(Appendix, B-10)

The error in this case occurred in the application of the standards under Federal Rules of Civil Procedure, Rule 56 and the proper consideration to be given to opposing expert depositions and affidavits when viewed in the context of the facts and inferences before the court. It is in this regard that the court below erred in affirming summary judgment on Petitioner"s defective design claim.[1]

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[1]Actually, the trial court improperly struck a portion of the expert affidavit. Although the Court of Appeals reversed this ruling in part, it affirmed the trial court finding that the

Reasons for Granting the Petition

The court below violated the mandates of this Court in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) by applying Federal Rules of Civil Procedure, Rule 56 in such a way as to affirm the grant of summary judgment when the affidavit and expert deposition testimony established the defective design of a product and this same evidence, along with the fact that the alternative design was already in use, established the feasibility of the alternative design - - thereby setting forth triable evidence of both prongs of the defective design claim.

The appeal court below correctly concluded that the trial court improperly struck the entirety of affidavit of Dr. John Morse, a recognized engineering expert.[2] It concluded

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evidence was still not sufficient to overcome summary judgment.

[2]As was demonstrated in the Court of Appeals, the motion to strike a portion of Dr. Morse"s affidavit did not

that "the exclusion of the "material choice" portion of Dr. Morse's affidavit was harmless error ." At Appendix, B-12 It reached this conclusion because:

> Although Dr. Morse's affidavit might present a material fact issue on the existence of an alternative design capable of preventing the damage at issue (the first prong of La.Rev.Stat. §§ 9:2800.56), it does not provide any evidence for whether the potential for damage created by using stainless steel "outweighed" the attendant burden on Duriron and the adverse effect of

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relate to his opinions about the improper material selection. That motion only related to Dr. Morse"s opinions about certain alternative designs (Teflon sleeves and Teflon coating). Also before the court was the affidavit of Dr. Shelton that concluded that stainless steel was not the proper material to be used in the valve since Duriron was aware of its use, the fact that Duriron had subsequently concluded that stainless steel should be replaced. Despite this, the court of appeal affirmed the grant of summary judgment.

> the carbon steel on the valve's utility. *See* La.Rev.Stat. § 9:2800.56(2).

(Appendix, B-9)

In reaching this conclusion, the Court of Appeals ignored other portions of Dr. Morse"s affidavit and/or read them in the abstract rather than in the context of what he said and the rest of the evidence.[3] In the unstricken portion of his

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[3]Not only did Dr. Morse and Dr. Shelton provide affidavits, they were both deposed. Those depositions were also introduced into evidence. In those depositions, Dr. Morse and Dr. Shelton gave significantly more details about the bases for their opinions, the steps they undertook in forming those opinions and the things they relied upon. As this and the other evidence before the court below would have supported a claim at trial, summary judgment should not have been granted.

affidavit, Dr. Morse concluded that the valve was "unreasonably dangerous and could and should have been changed under the circumstances that the valve was sold." The affidavit must be read in light of law on defective design, which includes a requirement that "the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect ... of such alternative design on the utility of the product." La.Rev.Stat. §§ 9:2800.56 Accordingly, when Dr. Morse opined that it "should" have been changed and that carbon steel bolting "would have been a more suitable alternative design", this includes a conclusion that the burden of the alternative design and the effect on the product were outweighed by the benefits from the change. Not only was this statement made in the context of the requirements under the Louisiana

Products Liability Act, they were made in light of Dr. Morse"s extensive training and experience, which would have required that he consider the practicality of the proposed change in light of the potential detriment resulting therefrom. Accordingly, in determining the facts established by this affidavit, the reasonable inference that the change was reasonably required should have been considered and should have precluded summary judgment. Not to do so is to fail, as this Court has required, to consider all inferences from Dr. Morse"s affidavits in favor of the party opposing summary judgment. *Adickes v. S. H. Kress & Co.* , 90 S.Ct. 1598, 398 U.S. 144, 26 L.Ed.2d 142 (1970); *United States v. Diebold, Inc.*, 82 S.Ct. 993, 369 U.S. 654, 8 L.Ed.2d 176 (1962); *Cedillo v. International Ass'n of Bridge & Structural Iron Workers, Local Union No. 1*, 603 F.2d 7 (7th Cir. 1979) The inference ignored

by the court below was very reasonable and was sufficient to raise a jury question as to the only remaining issue on the defective design claim.[4]

Ignoring this portion of the affidavit, even though the Court of Appeals ruled that it should not have been stricken, is inconsistent with this Court"s ruling in *Daubert*, which does not allow the grant of summary judgment in the face of an affidavit which sets forth facts (along with the other facts) and opinion which, if believed, would be sufficient to meet the plaintiff"s burden at trial. As Dr. Morse"s conclusions were

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[4]In addition, as discussed below, the facts of the case, of which the affidavit was only a portion, also established the feasibility of adopting the alternative design. The alternative design was in use long before Mr. Jones" accident. See discussion below.

made in the context of all of the evidence before the court and reviewed in preparation of the affidavit, they were not conclusory.

> *The court below misconstrued this Court's mandates in Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), affirming the grant of summary judgment by reading the affidavit evidence in the abstract rather than in the context of the entire record, even though the entire record presented sufficient evidence to meet plaintiff's burden at trial on the issue of defective design*

Even more substantial than the inference in the affidavit of Dr. Morse is the other evidence before the court below. That court had found that Dr. Morse's affidavit established the first prong of Louisiana's defective design claim. Ignoring the rest of the unstricken portions of the affidavit, it assumed that Dr. Morse rendered no opinion on the whether "the potential for damage created by using

stainless steel 'outweighed' the attendant burden on Duriron and the adverse effect of the carbon steel on the valve's utility. *See* La.Rev.Stat. § 9:2800.56(2)." (Appendix, B-14) Even if it were assumed that this affidavit did not establish this prong (the only other requirement under the Products Liability Act for a defective design claim), the court below should have considered the other evidence before it.

Under the doctrine of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), the party upon whom the burden would rest at trial has the burden on summary judgment of coming forth with evidence that could be sufficient to meet his burden at trial. However, it was error for the court below to isolate the evidence (*i.e.*, affidavit of Dr. Morse) rather than look to the

entire evidence in globo to determine if the plaintiff met his burden on summary judgment.

In the totality of the facts of the case, of which the affidavit was only a portion, the feasibility of the alternative design (carbon steel bolts) was also established. The alternative design was in fact in use long before Mr. Jones' accident. As such, the decision had already been made by Duriron that a change in design was warranted because the likelihood and gravity of the harm "outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect . . . of such alternative design on the utility of the product." Accordingly, there was evidence from which a jury could reasonably conclude that the plaintiff would prove both elements of the defective design claim and summary judgment should not have been granted. When this evidence

is considered with that portion of the affidavit that was not stricken and the affidavit of Dr. Shelton (that the use of stainless steel constituted an improper design for the valve as used), both prongs of the defective design claim were shown and the jury should have been allowed to determine this issue. It was error for the court below to fail to considered the entirety of the record before it in determining whether summary judgment was proper. *C.f., Adickes v. S.H. Kress and Co.*, 90 S.Ct. 1598, 398 U.S. 144, 26 L.Ed.2d 142 (1970) (look at entire set of facts to determine whether plaintiff can meet his burden at trial, not just direct evidence); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (court must review the record "taken as a whole"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251, 106 S.Ct. 2505,

91 L.Ed.2d 202 (1986) (same) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (same).

Other Defective Design Claims in the Affidavit of Dr. Morse Should Not Have Been Ignored

Even though not subject to the motion to strike (see discussion above), the trial court struck other defective design opinions by plaintiff's expert, Dr. Morse.[5] Ignoring the

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[5]The affidavit listed four alternative designs: (1) use of carbon, as opposed to stainless, steel bolting; (2) addition of Teflon coating to the bolting; (3) addition of a Teflon sleeve around the bolting; and (4) expansion of the crevice (where the chloride contacted the bolting) between valve pieces connected by the bolting, in order to alert maintenance workers to the possibility of SCC. The only opinions made the subject to the motion to strike were the two alternative designs listed as (2) and (3). There was no motion related to

fact that the trial court had gone beyond the scope of the defendant's request on the motion to strike, the Court of Appeals below, as one of the bases for affirming the trial court striking the other defective design claim, concluded that the additional opinion on defective design related to the crevice that contributed to the stress corrosion cracking, could not be considered in opposition to the motion for summary judgment. It erroneously found that Dr. Morse agreed in this deposition that "the type of bolting -- stainless steel -- was the only design defect to which his report had referred." (Appendix, B-11)[6]

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(1) and (4) or to other portions of the affidavit.

[6]The basis of this writ application is not simply the erroneous application of motion to strike. Instead, it is based on the erroneous application of Rule 56 in derogation

This error began with a comment in oral argument in the court below where the Respondent misconstrued the testimony of Dr. Morse. In that argument Respondent relied upon an affirmative response to a question as to whether "the only defect [Dr. Morse was] talking about in all of this stuff" is stress corrosion cracking. However, a review of the entire line of questioning shows that this response was only related to paragraph 10 of his report, which was a very minor portion of the original report. The statement in Dr. Morse's deposition occurred after the following exchange:

> Q. What do you mean in paragraph 10 of your opinions –or Section 10 where you say "It is my opinion the valve was defective and

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of this Court's ruling in *Daubert*, which hold that such a motion cannot be granted in the face of unobjected to expert testimony that would support the plaintiff's claims.

unreasonably dangerous"?

. . .

A. Well, considering what it was and what it was used for and the defect that it had, that was -- PPG would not have an expectation, based on their knowledge of what they know that Durco knows about the valves that they sell them, PPG would have no reason to suspect that they've got this hidden defect that obviously can cause serious injury.

Following an off-record conversation between the attorneys the testimony continued.

Q. (Mr. Hart continued.) Looking at your answer, you said for the defect that it had, talking about the valve. What is the defect that you're talking about? Is it simply the fact that it had stainless steel bolts?

A. That were susceptible to stress corrosion cracking under the conditions the -- that the valve was in.

Q. Okay. And that is the only defect you're talking about in all of this stuff.

A. That's correct, and the ramifications of that stress corrosion cracking.

Exhibit # 4, Deposition testimony of Dr. John Morse pp. 63 – 65.

Accordingly, it is clear that what Dr. Morse was talking about in his deposition was the defects related to stress corrosion cracking. He was not renouncing what he said in paragraph 6 (page 8 of the report), wherein he stated "It is my opinion that there was a crevice between the valve body and the bonnet that can trap brine and that the bolts pass through the crevice." That condition, just like the fact that the bolts were made of stainless steel, also contributed to the stress corrosion cracking.[7] Accordingly, since the defendants were placed on notice in the report and simply failed to question Dr. Morse on this point was not a bases to strike

[7]Dr. Slater, the defense expert, agreed that trapping brine next to the bolts would increase SCC.

that portion of the affidavit.[8]

As to portion of Dr. Morse's affidavit relative to the crevice should not have been stricken, it too provided a basis for the jury to conclude that the valve was defectively designed. In that affidavit, Dr. Morse concluded the valve should have been manufactured without a crevice. This opinion, which was not properly stricken (as discussed above) should have been considered in connection with the other evidence in the case. In rejecting the claim that Dr. Slater's deposition also provided additional evidence of a defect related to the crevice, in the original opinion the court

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[8]Had the defendants not deposed Dr. Morse at all (rather than simply fail to have questioned him on this point), the affidavit of Dr. Morse certainly could have been considered in opposition to the motion for summary judgment.

misconstrued the point raised by the plaintiff. Specifically, the court relied on the fact that counsel for plaintiff had prefaced his questions about the crevice with a statement that he was not asking Dr. Slater to opine on the appropriateness of the design. (Appendix, B-18) All counsel was saying was that the question was not designed to elicit an expert opinion on the availability of another design. That issue was covered in Dr. Morse's affidavit. The question to Dr. Slater was being limited to the issue of the effect the crevice and accumulation of brine in contact with the bolts had. Accordingly, considering the opinion about the defective design and the opinion about the causative effect of the design, there was evidence from which the jury could have concluded that the defectively designed crevice caused the accident and the matter should have gone to the jury on that

issue.

Once the affidavit is submitted and properly considered, summary judgment should only be granted if "the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true." *Daubert*, 509 U.S. at 596. This evidence must be viewed in the light most favorable to the party opposing the summary judgment. *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349 (CA6) cert. denied, 506 U.S. 826, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992) This was not done here, the trial court and the Court of Appeals simply chose to ignore relevant, pertinent and sufficient evidence from which the jury might reasonably conclude that plaintiff had proven a defectively designed product. This evidence came in the form of affidavits,

depositions of the various experts, and the relevant fact, as evidenced by the change in design, that the alternative design advocated by plaintiff's experts was feasible.

Conclusion

The Court of Appeals below properly concluded that Dr. Morse's affidavit should not have been stricken in its entirety. It also properly concluded that the affidavit established that stainless steel was an improper material selection for the bolts on the valve as used. It erred when it concluded that the other element for a defective design claim under Louisiana law, that "the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect ... of such alternative design on the utility of the product" was not established by the evidence. This element was established by the expert

testimony of Dr. Morse in his affidavit. It was also established by the other evidence presented, including the deposition testimony of Dr. Morse and Dr. Shelton. Finally, this element was established by the fact that the change in design had already been implemented by the Respondent as it had concluded that the benefit of the change outweighed any costs associated therewith. Having submitted evidence from which a reasonable jury could have concluded that the elements of a defective design products liability claim had been proved, the court below erred in affirming the grant of summary judgment dismissing this claim. Accordingly, the court below's ruling is inconsistent with the rulings of this Court and the Petition should be granted.

WHEREFORE, Petitioner prays that this writ be granted.

Appendix A

UNITED STATES DISTRICT COURT OPINION
MIDDLE DISTRICT OF LOUISIANA

No. 99-CV-1621

[Filed May 17, 2002]

KEITH JONES	:	CIVIL ACTION NO. 99-1621
versus	:	JUDGE TRIMBLE
DURIRON COMPANY, INC	:	MAGISTRATE JUDGE WILSON

MEMORANDUM RULING

Presently before the Court is a motion for summary judgment (doc. 29) filed by defendant Duriron Company, Inc., Flowserve FCD Corporation, Flowserve SD Corporation, Flowserve RED Corporation and Flowserve Corporation (collectively "Flowserve"), seeking the dismissal of all claims in this products liability action. Plaintiff-Intervenor PPG

Industries, Inc. ("PPG") has filed two motions to strike (docs. 40, 41) several of Flowserve's exhibits filed in support of the motion for summary judgment. Also, Flowserve moves to strike (doc. 50) the affidavits of Thomas Shelton, Ph.D. and John Morse, Ph.D., the expert witnesses offered by Plaintiff Keith H. Jones. For the reasons stated below, the motion for summary judgment (doc. 29) will be GRANTED, and all claims against Flowserve will be DISMISSED WITH PREJUDICE. PPG's motions to strike (docs. 40, 41) will be DENIED, and Flowserve's motion to strike (doc. 50) will be GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

On August 17, 1998, Mr. Jones, an employee of PPG, was injured while working at PPG's sprawling chemical production plant in Lake Charles, Louisiana. As Mr. Jones

opened a "plug valve" on a tank that contained hot brine, the bolts that secured the top portion of the valve, sometimes called the "top cap," "top works" or "bonnet," to the body of the valve failed, causing hot brine to spill over Mr. Jones. Mr. Jones seeks to recover damages for his personal injuries, and PPG seeks to recover worker's compensation payments made to Mr. Jones.

The valve was manufactured by Flowserve, formerly known as The Duriron Company, Inc., under the Durco brand-name[9]. The Durco brand was marketed and sold to industrial and chemical plants. The valve at issue in this case, a Durco

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[9]The Defendants indicate that the proper corporate defendant in this case is Flowserve Corporation, which owns and operates the company formerly known as The Duriron Company, Inc. The Defendants state that the names "Durco," "Duriron" and "Flowserve" all identify the same entity, and the names are used interchangeably. (Defs. Mem. In Supp. Of Mot. For Summ. J. at I).

T-41 plug valve rated for 150 lbs., was manufactured between 1977 and 1983. Durco designed its T-41 valve to be used in many different applications, and PPG used it under different conditions at the Lake Charles plant, including chloride environments. The valve was sold to PPG pursuant to PPG's specifications. PPG created its specifications to meet the detailed requirements of its chemical processing plant.

The Lake Charles plant ordered many T-41 plug valves and kept several replacements on site in its warehouse. If the warehouse ran out of replacement valves, PPG would contact is local distributor and request valves that conformed to the applicable PPG specification, number V-279 in this case. The PPG purchasing agent, James Douglas Williamson, testified that valves were ordered by specification number, and not for any specific application or any specific site in the

plant.

In its specifications, PPG authorized its purchasing department to choose between three manufacturers for the type of valve at issue in this case but the PPG specifications did not address the material required for the top cap nuts and bolts. At the time this valve was manufactured, Durco used stainless steel for the top cap nuts and bolts as its standard offering. Durco informed purchasers that it used stainless steel as the standard material for nuts and bolts on the parts list in its catalog. However, purchasers could request any available material for the nuts and bolts.

The experts consulted in this case agreed that the top cap bolts failed due to stress corrosion cracking ("SCC"). SCC is difficult to identify on visual inspection. SCC is different than "general corrosion" (rust), which begins on the outer

surface of the metal and works its way toward the center. The stainless steel at issue in this case (304 SS), which falls within the category of austenitic stainless steel, is highly resistant to general corrosion, but it is susceptible to SCC in environments with high concentrations of chloride. The chemical processing industry has been aware of the SCC problem since the 1940s. Expensive alloys have been developed that are resistant to it, but it remains difficult to predict when and where SCC will occur.

At the time of manufacture, Durco offered stainless steel as its standard material for the top cap bolts to take advantage of its resistance to general corrosion and to meet the demands of the chemical processing and production industry. The selection of bolting materials requires balancing cost, susceptibility to general corrosion and

susceptibility to SCC. At the time the valve at issue in this case was manufactured, Durco offered, and still offers, a range of materials to be used for the nuts and bolts on its valves. Purchasers, such as PPG, could have selected one of the expensive alloys that were resistant to both general corrosion and SCC, or they could have selected carbon steel that was resistant to SCC, but susceptible to general corrosion. For example, the PPG plaintiff in Natrium, West Virginia, specified carbon steel bolts for use in chloride environments. However, the PPG plaint in Lake Charles used the standard stainless steel. Even though carbon steel was less expensive than stainless steel, stainless steel was the chemical industry standard until 1984.

In 1984, the chemical processing industry recommended carbon steel bolting in chloride environments,

despite its susceptibility to general corrosion and potentially shorter life span, because it was easier to spot general corrosion than SCC. Thus, after the valve at issue in this case was manufactured, Durco changed its standard top cap bolting material from stainless steel to carbon steel. Durco changed the description of its valve in its catalog, but it did not send a special notice to PPG that it was changing the material in its new valves.

The PPG materials specialist in Lake Charles, Don Haines, knew it was industry practice to use stainless steel bolting at the time PPG purchased the valve in this case and into the early 1990s. However, PPG claims that it was entitled to a special warning of the dangers associated with this valve and SCC when Durco changed its standard material. Durco contends that PPG had notice of the danger, and as a

sophisticated user, should have been aware of the risks associated with the valve at issue in this case. Durco sales representatives would visit the Lake Charles plant, and knew that some valves with stainless steel bolts were being used in chloride environments in the plaint, but they did not know where each valve was located or which ones had stainless steel bolts.

II. LAW AND ANALYSIS

A. Summary Judgment Standard

A district court properly grants summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The movant bears the initial burden of

presenting the basis for its motion and identifying those portions of the pleadings, depositions, and answers to interrogatories, admissions on file and affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). Once a proper motion has been made, the non-moving party may not rest upon mere allegations or denials in the pleadings but must set forth specific facts showing the existence of a genuine issue for trial. See *Celotex*, 477 U.S. 322-23, 106 S. Ct. at 2552. However, credibility determinations, weighing the evidence, and drawing legitimate inferences from the facts are

functions for the trier-of-fact at trial, not for the judge on a motion for summary judgment. See *Anderson*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513.

B. Products Liability Claims

The Louisiana Product Liability Act ("LPLA") provides "the exclusive theories of liability for manufacturers for damage caused by their products." La.R.S. 9:2800.52. To recover under the LPLA, a plaintiff must prove the following two elements: (1) the damages arose from a reasonable anticipated use of the product, and (2) damages were proximately caused by a characteristic of the product that renders it unreasonably dangerous. *See* La.R.S.9:2800.54(A) *Kampen v. American Isuzu Motors, Inc.*, 157 F3d 306, 309 (5th Cir. 1998) (en banc). A product may be "unreasonably dangerous" in only four ways: (1) in construction or

composition, (2) in design, (3) because of an inadequate warning, and (4) because it does not conform to an express warranty of the manufacturer. See La. R.S. 9:2800.54(B). Neither Mr. Jones nor PPG assert a claim based on a breach of warranty.

1. Construction or Composition

The LPLA provides the following definition for unreasonably dangerous in construction or composition:

> A product in unreasonably dangerous in construction or composition, if at the time the product left is manufacturer's control, the product deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer.

La.R.S. § 9:2800.55

Mr. Jones argues that the valve was unreasonably dangerous in construction or composition because Durco used stainless steel bolting and failed "to modify the crevice

and/or to include Teflon coating and/or a Teflon sleeve over the bolts." (Jones' Memo in Opp. At 4). This misconstrues the requirements of a claim under a theory of unreasonably dangerous in construction or composition. In this case, there is no evidence that the valve deviated from the specifications or performance standards set by Durco. While using stainless steel, failing to "modify the crevice" or failing to use a Teflon coating may form the basis of a claim that the valve was unreasonably dangerous in design, these aspects of the valve cannot establish a claim that the valve was unreasonably dangerous in construction or composition. Therefore, summary judgment on the unreasonably dangerous in construction claim will be GRANTED.

2. Design

The LPLA provides the following definition for

unreasonably dangerous design:

> A product is unreasonably dangerous in design if, at the time the product left the manufacturer's control:
>
> (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
>
> (2) The likelihood that the products design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on utility of the product. An adequate warning about a product shall be considered in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

La.R.S. 9:2800.56

In support of his claim that the valve was unreasonably dangerous in design, Mr. Jones offers the affidavit of John Morse, Ph.D. Dr. Morse sets forth the following four alternative designs: (1) use carbon steel bolting

instead of stainless steel, (2) Teflon coating to the bolts, (3) add a "Teflon sleeve around the bolts," and (4) "[o]pen up the crevice so that any leak would be more apparent and/or so that any corrosion in the crevice could be seen and thereby put the user on notice of the potential for the containment of chloride and other materials that would lead to stress corrosion cracking." (Morse Aff. At 1-2). Dr. Morse states in a conclusory manner that the changes in design "could have been reasonably made." (Morse Aff. At para. 4). Without addressing whether these alternative designs are sufficient to establish a genuine issue of material fact regarding the burden on the manufacturer of adopting these alternative designs or how these designs would affect the utility of the valve, these alternative designs were not disclosed to the Defendants during discovery. Pursuant to Federal Rule of

Civil Procedure 26(a)(2)(B), Dr. Morse was required to prepare a report that contains "a complete statement of all opinions to be expressed and the basis and reasons there. . ." Fed. R. Civ. P. 26(a)(2)(B). Dr. Morse's original report, entitled a "Preliminary Engineering Report," merely identified a "crevice between the valve body and bonnet that can trap brine and bolts pass through this crevice." (Morse Report at 8). Dr. Morse made no indication that he would recommend expanding the "crevice" as an alternative design or that he would recommend Teflon coating as an alternative design. Also, Dr. Morse did not disclose his opinions regarding alternative designs during his deposition. Additionally, Dr. Morse has not established that it was necessary to revise his opinions in light of evidence that was not available to him before he prepared his report. Therefore, Flowserve's motion

to strike the affidavit of Dr. Morse will be GRANTED.

Flowserve also moves to strike the affidavit of Plaintiff's expert in metallurgy, Thomas Shelton, Ph.D., for the same reason, that his affidavit sets forth opinions that were not made available to Flowserve during discovery. However, a copy of Dr. Shelton's report has not been provided for this Court's review. Thus, the motion to strike Dr. Shelton's affidavit will be DENIED, but Dr. Shelton's affidavit does not address an alternative design of the valve.

In light of the absence of any admissible evidence regarding a reasonable alternative design for the valve, summary judgment on the unreasonably dangerous in design claim will be GRANTED.

3. Warning

Regarding adequate warnings, the LPLA provides the

following:

> A manufacturer is not required to provide an adequate warning about his product when:
>
> (1) The product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics, or
>
> (2) The user of handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

La.R.S. § 9:2800.57(B)

"[T]hose who are 'sophisticated users' of a product may be presumed to know about the danger presented by the product due to their familiarity with it." *Welch v. Technotrim, Inc.*, 778 So.2d 728, 735 (La.App.2 Cir. 2001). Also, a manufacturer has no duty to warn the employees of a purchaser when the employer knows, or should have know,

of the risks, and had a duty to warn and train its employees about these risks. *Davis v. Avondale Indus., Inc.*, 975 F.2d 169, 173 (5th Cir.1992). "[A] manufacturer's duty after the product leaves the manufacturer's control is no different from the duty at the time of the product left the manufacturer's control – i.e., to exercise 'reasonable care to provide an adequate warning' of 'a characteristic that may cause damage.'" *Sisk v. Sears, Roebuck & Co.* 1996 Wl 736967, *2 (E.D. La. Dec. 23, 1996) (*quoting* La. R.S. 9:2800.57). A manufacturer bears the burden of proof when raising the issue that a user "knew or reasonably should have been expected to know of the dangerous characteristic of the product that caused the damage." *Swope v. Columbian Chemicals Co.* 281 F.3d 185, 205 (5th Cir. 2002).

The standard of an ordinary user set forth in La.R.S.

§ 9:2800.57(B)(1) is not applicable in this case because an ordinary user of the Durco T-41 valve might include companies and industries that do not operate in chloride environments. However, Flowserve is not required to warn PPG because PPG already knew of risks in using stainless steel in chloride environments, and, as a sophisticated user, PPG should have been aware of the danger posed by this specific valve.

PPG in general, and personnel at the Lake Charles plant in particular, knew that stainless steel was susceptible to SCC in chloride environments both at the time the valve was purchased and in the mid-1980s when Durco changed the standard material that it used for valve bolts. It was not necessary for Flowserve to warn PPG regarding this risk because it was already known to PPG.

PPG is a leading chemical company that operates several plants that produce alkali-chloride chemicals in environments with high concentrations of chloride. PPG even produces and sells a chemical coating for stainless steel and carbon steel that is designed to prevent SCC. PPG has internal expertise to select materials for the safe operation of its plants and does not require the advice of the manufacturers of the many devices that are installed in its plants. (Haines Dep. at 77). While PPG does not manufacture valves, it sets the specifications for them based on its operations, and after this accident PPG selected a material that was not recommended by Flowserve. It is the practice of PPG to specify the components of its valves and specify what valves are required for its complicated operations. It's plant in Natrium has refused to use stainless steel bolt in a

chloride environment since 1969, well before this valve was manufactured. (Spencer Dep. at 20). Even though the standard durco valve had stainless steel bolts, the Natrium plant specified the same valve with carbon steel bolting. (Spencer Dep. at 29-32). Mr. Haines testified that he has been employed at the Lake Charles plant since 1975 and that he had witnessed SCC failures in other applications for the last 25 years. (Haines Dep. at 44) While not a metallurgist, Mr. Haines is a registered professional engineer and knew that some areas of the plant were more susceptible to SCC, and he knew that the valve in this case was located in an area that was more susceptible to SCC. (Hines Dep. at 44-45). Mr. Haines had witnessed SCC in stainless steel tubing; in vessel walls; bucket elevators, and in piping. (Haines Dep. at 43). Also, he has witnessed other bolts, made of nickel or inconel,

crack in a high temperature caustic environment. (Haines Dep. at 44). Mr. Haines has even seen stainless steel top cap bolts on a smaller size plug valve fail due to SCC six months before the accident that injured Mr. Jones. (Haines Dep. at 55).

While Mr. Haines attempts to distinguish the failure of the stainless steel top cap bolts that occurred six months before the accident in this case, because the valve in the earlier case was exposed to steaming chloride and caustic in a more "aggressive" environment, this incident was sufficient to put Mr. Haines and the PPG staff in Lake Charles on notice of the potential failure of stainless steel plug valve bolts caused by SCC. The incident that occurred six months before the accident in this case should have prompted an investigation into what would have caused SCC to occur in

less "aggressive" environments. Mr. Haines testified that no investigation of what might be necessary to prevent a reoccurrence was performed. (Haines Dep. at 58). Mr. Haines admitted receiving the catalog for the valve, which showed stainless steel as the standard material for the top cap bolts. (Haines Dep. at 24-28). Mr. Haines admits there were "lots" of other valves in use at the plant that had stainless steel bolting, but the plant did not have a list of those valves that used stainless steel bolting at any time before the accident. (Haines Dep. at 45-46; 54).

PPG should have been aware of the danger posed by the specific valve at issue in this case because PPG is a sophisticated user of valves in chloride environments. See, e.g., *Scallan v. Duriron Co.*, 11 F.3d 1249, 1252 (5th Cir. 1994) ("it cannot be seriously contended that Allied is not a

sophisticated user [of a chlorine pump]. . .Allied 'ranks among the world leaders' in chemical process.").

Essentially, PPG argues that its Lake Charles plant was entitled to a warning that the valve that caused the injuries to Mr. Jones was susceptible to SCC, even though PPG as a whole and its personnel in Lake Charles knew of the susceptibility of stainless steel bolts to fail due to SCC. However, the LPLA does not require such a warning under the circumstances of the case because PPG knew of the risks associated with stainless steel and reasonably should be expected to know of the risks associated with the valve at issue in this case. The LPLA's standard is reasonable in this case because the susceptibility of stainless steel to SCC is largely a function of the concentrations of chloride, and PPG was in the best position to know and control this causative

factor. While Durco sales representatives made sales calls to the Lake Charles plant, and generally knew the valves were used in chloride environments, they were not in a position to know the concentrations of chloride at the plant or the length of service of each valve. PPG itself was unable to document the length of service, and it admits there was some areas of the plant where SCC was more likely to occur.

Since PPG knew of the risks of using stainless steel bolts in chloride environments and should have known of the risks associated with the valve at issue in this case, PPG is a "sophisticated intermediary" with a duty to warn its employee, Mr. Jones, of the danger that the valve might fail. *See Swope*, 281 F.3d at 209.

In light of PPG's expertise in chemical processing, the refusal of the plant in Natrium to use stainless steel in

chloride environments, and the incidents of SCC in different applications at the Lake Charles plant, no reasonable jury could find that PPG was not aware of the risks associated with using stainless steel bolts in environments with high concentrations of chloride, and no reasonable jury could find that PPG should not have been aware of the risks to Mr. Jones in opening the valve that caused his injuries. Therefore, the motion for summary judgment on the claim that warnings were inadequate will be GRANTED.

C. PPG's motion to strike (doc. 40, 41)

PPG seeks to strike four exhibits (Def's Ex. F, G, H, and I) that Flowserve downloaded from the Internet websites of PPG (Ex. F, G, I) and the Securities and exchange Commission ("SEC") (Ex. H) to bolster its claim that PPG is a sophisticated user of the valve and familiar with SCC. PPG

moves to strike these exhibits because they are unauthenticated. PPG does not content that they have been doctored, merely that they are Internet printouts. Authentication is satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed.R. Evid. 901(a); *United States v. Simpson*, 152 F. 3d 1241, 1249 (10th Cir. 1998); see also *Actonet, Ltd. v. Allou Health & Beauty Care*, 219 F. 3d 836, 848 (8th Cir. 2000) (holding that "HTML codes are similar enough to photographs to apply the criteria for admission of photographs to the admission of HTML codes"). Flowserve's attorney submits an affidavit (doc. 52) testifying that the website printouts accurately reflect the contents of the website and that the website is attributable to PPG and the SEC. Therefore, the motion to strike these exhibits will be DENIED.

PPG also seeks to strike exhibits (Defs.' Ex. B, L, N, O, P and partially W) submitted by Flowserve to show the degree of sophistication which is possessed by PPG, that the advise offered to PPG concerning materials selection was rejected by PPG, that PPG was capable of assessing risk, that PPG makes decisions concerning the level of risk it is willing to accept with regard to selection of materials to be used in their plant, and that PPG is willing to accept a level of risk that Flowserve is not willing to accept. (Flowserve's Mem. In Opp. To Mot. To Strike at 2). These exhibits concern the selection of a replacement material for the valve bolts at the plant after after the accident at issue in this case. The PPG plant in Lake Charles elected Alloy 20, another type of stainless steel that is less susceptible to SCC than 304 SS but more susceptible than carbon steel. Flowserve and the PPG plant

in Natrium recommended carbon steel's susceptibility to general corrosion. This selection process occurred after the accident at issue in this case, and PPG seeks to strike the evidence, arguing it concerns a subsequent remedial matter that is inadmissable pursuant to Federal Rule of Evidence 407. "Since these repairs were made by a non-defendant, Rule 407 does not bar the evidence." *Dixon v. International Harvester Co.*, 754 F.2d 573, 583 (5th Cir. 1985) (holding subsequent remedial measure by plaintiff's employer that intervened at trial is admissible); *TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F. 3d 397, 400 (4th Cir. 1994) (holding repairs performed by someone other than defendant are admissible); but *see In re Air Crash disaster*, 86 F.3d 498, 529 (6th Cir. 1996) (holding subsequent remedial measures by a plaintiff are not admissible).

PPG also seeks to strike the affidavit of Plaintiff's expert in metallurgy John E. Slater, Ph.D. PPG argues that Dr. Slater's affidavit violates the requirement of Federal Rule of Civil Procedure 56(e) that affidavits supporting or opposing motions for summary judgment must be based on personal knowledge. Apparently, Dr. Slater co-authored his expert report, which has not been submitted for this Court's review, with a colleague, Dr. Harry West. Dr. West was more familiar with safety and maintenance at chemical processing plants and provided opinions regarding PPG's maintenance of the valve. Dr. Slater was more familiar with the condition of the metal and the cause of the bolt failure. In their depositions, Dr. West and Dr. Slater specified which portions of the opinions they would testify to at trial. PPG now seeks to preclude the consideration of Dr. Slater's affidavit because he

states in his affidavit that PPG did not perform effective maintenance on the valve. Dr. Slater states in part:

> The valve had clearly been leaking internal product for a considerable period of time. The non-stainless portions of the valve had suffered heavy general corrosion. Information from PPG shows no systematic or consistent inspection or maintenance program in place. Apparently, all that was performed was a "cosmetic" painting program. Had a reasonable maintenance/inspection program been performed, it is probable that the leakage-which ultimately led to the chloride stress corrosion cracking on the bolts-would have been noticed, and the chloride stress corrosion cracking either prevented or the bolts changed out.
>
> PPG. . .[f]ailed to perform an effective maintenance or inspection program which would have detected the obvious leakage at the valve in question, and which ultimately led to the stress corrosion cracking of the bolts.

Slater Aff. At 3.

Dr. Slater's reference to the condition of the bolt is sufficient to establish that his opinion is based on his visual inspection of the valve and his expertise in metallurgy. While

Dr. West and Dr. Slater's co-authorship of their report, which apparently mirrors the affidavit (West Dep at 51-53; Slater Dep. at 22-25, 54-57), would present problems if Dr. Slater were to testify any further regarding the PPG maintenance program or the industry standard for an inspection program, the statements quoted above are reasonably based on a visual inspection. The Court is satisfied that the affidavit was based on personal knowledge and that the affiant is competent to testify to the condition of the valve and that leakage could have been identified on visual inspection. Additionally, PPG objects to Dr. Slater's use of deposition summaries prepared by an employee of his consulting company. However, Federal Rule of Evidence 703 allows expert witnesses to offer opinions based on "[t]he facts or data. . .perceived by or made known to the expert. . . . [i]f of

a type reasonably relied upon by experts in the particular field in forming the opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted." Fed. R., Evid. 703. It was reasonable for Dr. Slater to rely on deposition summaries prepared by his assistant in forming his opinion. See, e.g., *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1432 (5th Cir. 1989) (expert's opinion held not excludable because of reliance on information supplied by counsel.) Therefore, PPG's motion to strike the affidavit of Dr. Slater will be DENIED.

II. CONCLUSION

For the reasons stated above, the motion for summary judgment (doc. 29 will be GRANTED, and all claims against Flowserve will be DISMISSED WITH PREJUDICE. PPG's motion to

strike (docs. 40, 41) will be DENIED, and Flowserve's motion to strike (doc. 50) will be GRANTED IN PART and DENIED IN PART.

THUS DONE AND SIGNED in chambers at Lake Charles, Louisiana this 17th day of May, 2002.

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

KEITH JONES	:	CIVIL ACTION NO. 99-1621
versus	:	JUDGE TRIMBLE
DURIRON COMPANY, INC	:	MAGISTRATE JUDGE WILSON

JUDGMENT

Pursuant to the Memorandum Ruling of this date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion for summary judgment (doc. 29) is GRANTED, and all claims against Defendants Duriron Company, Inc., Flowserve FCD Corporation, Flowserve SD Corporation, Flowserve RED Corporation and Flowserve Corporation (collectively "Flowserve") are DISMISSED WITH PREJUDICE; and

IT IS FURTHER ORDERED that Plaintiff-Intervenor PPG

Industries, Inc.'s ("PPG") motion to strike (doc. 40) is DENIED, and

IT IS FURTHER ORDERED that PPG's motion to strike (doc. 41) is DENIED, and

IT IS FURTHER ORDERED that Flowserve's motion to strike (doc. 50) is GRANTED IN PART and DENIED IN PART.

THUS DONE AND SIGNED in chambers at Lake Charles, Louisiana this 17th day of May, 2002.

JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-30582

[Filed August 21, 2003]

United States Court of Appeals,
Fifth Circuit

Keith H. JONES, Plaintiff-Appellant,
v.
FLOWSERVE FCD CORP.; Flowserve FSD Corp.; Flowserve, Inc., formerly known as Duriron Company, Inc.; Flowserve Red Corp., Defendants-Intervenor Defendants-Appellees,
v.
PPG Industries, Inc., Intervenor Plaintiff-Appellant.

No. 02-30582.

Aug. 21, 2003.

Employee and employer brought diversity action against manufacturer under Louisiana Product Liability Act

(LPLA) alleging failure to warn. The United States District Court for the Western District of Louisiana granted judgment for manufacturer. Plaintiffs appealed. The Court of Appeals held that: (1) district court did not abuse its discretion in striking three new alternative designs described in summary judgment affidavit of expert; (2) district court's refusal to admit portion of experts's affidavit, opining that stainless steel bolting in valve was unreasonably dangerous design, was harmless error; and (3) sophisticated user defense prevented employer, as chemical manufacturer, from prevailing on its failure to warn claim against valve manufacturer.

Affirmed.

Appeal from the United States District Court for the Western District of Louisiana. (99-CV-1621).

Eulis A. Simien, Jr., Simien & Simien, Baton Rouge, LA, for Plaintiff- Appellant.

Clarence Michael Hart, Taylor, Porter, Brooks & Phillips, Baton Rouge, LA, for Defendant-Appellee.

Before WIENER and BARKSDALE, Circuit Judges, and FURGESON, District Judge. [FN*]

FN* District Judge of the Western District of Texas, sitting by designation.

PER CURIAM. [FN**]

FN** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Keith Jones and his employer, PPG Industries, Inc. (Plaintiffs), challenge the summary judgment awarded Defendants (Duriron) against claims under the Louisiana Product Liability Act, La.Rev.Stat. § 9:2800.51, *et seq.* (LPLA). Primarily at issue is whether, for the failure-to-warn claim, PPG was a "sophisticated user." AFFIRMED.

I.

Jones worked in PPG's Lake Charles, Louisiana, chemical plant. In 1998, he opened a valve on a tank containing hot brine. Because of stress corrosion cracking (SCC), the bolting securing the top portion of the valve failed; Jones was sprayed with the brine and injured. The bolting was susceptible to SCC because it was stainless steel and the valve was used in a high-chloride environment.

The valve, the Durco T-41, had been manufactured between 1977 and 1983 by Duriron (now known as Flowserve). Duriron marketed and sold similar valves to industrial and chemical plants, including PPG. During this period, Duriron issued a catalog insert to its purchasers noting, *inter alia*, the stainless steel nature of the bolting. Concerning the valve at issue, PPG's Lake Charles plant specified it would accept any of three valve models, including the Durco T-41. The plant did not, however, specify the type

bolting--stainless or carbon steel--to be used for those valves.

Stainless steel bolting was the industry standard before 1984. Prior to then, however, Duriron had made carbon steel bolting available to PPG as an option. (Carbon steel is not susceptible to SCC; it is, however, susceptible to general corrosion.) In fact, since 1969, PPG had refused to use stainless steel bolting at its plant in Natrium, West Virginia; prior to 1984, that plant specified carbon steel bolting.

In 1984 (after the valve in question had been sold to PPG), the chemical process industry recognized the risk of SCC for stainless steel bolting in high-chloride environments and recommended that carbon steel be used instead. After the industry standard changed, Duriron began using carbon steel bolting in its standard Durco T-41 model. Duriron did

not, however, notify PPG of this change.

Jones filed this action in Louisiana state court, claiming Duriron violated the LPLA through: (1) the valve's defective design; (2) its defective manufacture; and (3) Duriron's failure to warn PPG of the dangers of stainless steel bolting in a high-chloride environment. After Duriron removed this action to federal court, PPG intervened to recoup workers' compensation paid Jones.

Duriron moved: (1) to strike an affidavit in opposition to summary judgment by one of Plaintiffs' experts, Dr. Morse; and (2) for summary judgment. Pursuant to an extremely comprehensive opinion, both motions were granted.

II.

Plaintiffs challenge the summary judgment against their defective design and failure-to-warn claims. In conjunction with the design claim, they contend the district

court erred in striking Dr. Morse's *708 affidavit; it was the primary basis for that claim.

A summary judgment is reviewed *de novo*, "employing the same analysis as the district court." *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 408 (5th Cir.2002), *cert. denied*, 537 U.S. 1188, 123 S.Ct. 1254, 154 L.Ed.2d 1020 (2003). The judgment is proper only if there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Under Louisiana law, the LPLA "establishes the exclusive theories of liability for manufacturers for damage caused by their products." La.Rev.Stat. § 9:2800.52. To be liable under the LPLA, a manufacturer must produce an item that is, *inter alia*, "unreasonably dangerous." La.Rev.Stat. §

9:2800.54(A). Along this line, a product may be unreasonably dangerous: (1) in construction or composition; (2) in design; (3) because of failure to warn about the product; or (4) because of non-conformity with a manufacturer's express warranty. La.Rev.Stat. § 9:2300.54(B). Again, Plaintiffs present design and failure-to-warn issues.

A.

Under the LPLA, a product is "unreasonably dangerous in design" if: (1) an alternative design existed; and (2) "[t]he likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect ... of such alternative design on the utility of the product." La.Rev.Stat. § 9:2800.56. A plaintiff has the burden of proof for these elements. La.Rev.Stat. § 9:2800.54(d). Regarding possible alternative

designs for the valve, Plaintiffs contend the affidavits and deposition testimony of Drs. Morse, Shelton, and Slater provide sufficient evidence to withstand summary judgment.

In his affidavit in Plaintiffs' amended opposition to summary judgment, Dr. Morse maintained, *inter alia*, that the valve was "unreasonably dangerous and could and should have been changed under the circumstances that the valve was sold." The affidavit listed *four alternative designs:* (1) use of carbon, as opposed to stainless, steel bolting; (2) addition of Teflon coating to the bolting; (3) addition of a Teflon sleeve around the bolting; and (4) expansion of the crevice (where the chloride contacted the bolting) between valve pieces connected by the bolting, in order to alert maintenance workers to the possibility of SCC. (In district court, Plaintiffs referred to their "material choice" claim as one for a defect in construction or composition. *See* La.Rev.Stat. 9:2800.55.

Now they group this claim with their design claims, along the lines of Dr. Morse's affidavit.)

Plaintiffs also contend: (1) the deposition of Dr. Shelton (their other expert) raised a material fact issue for two of the claimed design defects (stainless, instead of carbon, steel; and crevice size); and (2) the deposition of Dr. Slater (Defendants' expert) created a material fact issue concerning the crevice size.

1.

In striking Dr. Morse's affidavit, the district court ruled that "these alternative designs were not disclosed to the Defendants during discovery", insofar as neither Dr. Morse's report nor his deposition provided opinions on alternative designs. *See* Fed. R. Civ. P. 26(a)(2)(B) (expert witnesses required to submit report containing a "complete statement of all opinions to be expressed and the ... reasons

therefore....").

*709 A district court's refusal to admit an affidavit is reviewed for abuse of discretion. *E.g., Valdez v. Cockrell,* 274 F.3d 941, 957-58 (5th Cir.2001), *cert. denied,* 537 U.S. 883, 123 S.Ct. 106, 154 L.Ed.2d 141 (2002). In addition, an abuse of discretion is further reviewed under the harmless error doctrine: "[W]e will affirm the evidentiary rulings unless they affect a substantial right." *United States v. Hefferon,* 314 F.3d 211, 222 (5th Cir.2002).

[1] Plaintiffs contend Dr. Morse's report and deposition disclosed the alternative designs about which he opined in his subsequent affidavit in opposition to summary judgment. In his report, Dr. Morse stated in pertinent part: "Duriron should have specified carbon steel bolts instead of stainless steel bolts, since the carbon steel bolts are not subject to SCC. [Carbon steel bolts] are subject to general corrosion, but

it is much easier to detect and easier to predict." He concluded: "It is my opinion that the valve was defective and unreasonably dangerous."

When deposed, Dr. Morse was questioned about this conclusion. He stated that the *only defect* he had been describing was the stainless steel bolting "[t]hat w[as] susceptible to [SCC] under the conditions ... that the valve was in." Immediately thereafter, he *agreed* that the type bolting - stainless steel - was the *only* design defect to which his report had referred.

Along this line, concerning the three earlier-described alternative designs in addition to using carbon steel, Plaintiffs contend: (1) Dr. Morse noted the fact of the crevice in his report and deposition; and (2) regarding the two Teflon alternatives, Dr. Morse's report put Defendants on notice that design defects were generally at issue. Neither contention

satisfies Rule 26(a)(2)(B). In the light of Dr. Morse's above-described deposition testimony, the only design defect addressed in his report and deposition was the type bolting used in the valve.

Accordingly, the other three design defects described in Dr. Morse's affidavit (small crevice and lack of Teflon coat and sleeve) were not disclosed to Defendants as required. Therefore, the district court did not abuse its discretion by striking those three new alternative designs described in the affidavit.

Dr. Morse's affidavit contained the entirety of Plaintiffs' evidence regarding the Teflon design alternatives; therefore, summary judgment for Defendants on those two sub-claims was proper. As discussed *infra:* (1) the exclusion of the "material choice" portion of Dr. Morse's affidavit was harmless error; and (2) Plaintiffs offered other evidence in

support of their crevice-size claim.

2.

[2] Because Dr. Morse had earlier stated in his report and deposition that carbon steel bolting would have been a more suitable alternative design, the district court may have abused its discretion by striking that portion of his affidavit. However, as discussed *supra*, the abuse of discretion, if any, is subject to harmless error analysis. *Hefferon*, 314 F.3d at 222.

As noted, for an LPLA design defect claim: (1) an alternative design must have existed; and (2) the likelihood and gravity of the product's design causing damage must have outweighed the burden of adopting the alternative design, including the adverse effect that design would have on the product's utility. La.Rev.Stat. § 9:2800.56. In this regard, a plaintiff must produce evidence regarding

> the frequency of accidents like his own, the economic costs entailed by those accidents, or the extent of the reduction in frequency of those accidents that would *710 have followed on the use of his proposed alternative design ... the burden of switching to the alternative design ... [or] the loss of product utility that the use of the alternative design would have occasioned.

Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 183 (5th Cir.1990), *abrogated on other grounds, Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 n. 14 (5th Cir.1994).

Although Dr. Morse's affidavit might present a material fact issue on the existence of an alternative design capable of preventing the damage at issue (the first prong of La.Rev.Stat. § 9:2800.56), it does not provide any evidence for whether the potential for damage created by using stainless steel "outweighed" the attendant burden on Duriron and the adverse effect of the carbon steel on the valve's utility. *See* La.Rev.Stat. § 9:2800.56(2).

As stated earlier, Plaintiffs contend that the affidavit of their other expert, Dr. Shelton, created a material fact

issue on Duriron's choice of stainless, over carbon, steel. Dr. Shelton's affidavit did not state, however, that Duriron should have used only carbon steel in its T-41 valves or that stainless steel bolting did not have unique benefits. Instead, he only stated: Duriron should have *warned* PPG not to use stainless steel bolting in valves placed in high-chloride environments; and Duriron should have "considered" SCC in its selection of stainless steel bolting.

In sum, Plaintiffs have produced no evidence that the putative benefits of Duriron's use of carbon steel bolting would have outweighed the benefits of using stainless steel. This absence is especially noteworthy in the light of other parts of the summary judgment record. PPG Senior Design Engineer Alfred Spencer testified that, in non-chloride environments, he would choose stainless, instead of carbon, steel bolting. Presumably, this is because, as PPG Principal

Project Engineer, Don Haines, wrote, the use of stainless steel "g[o]t around" the problem of carbon steel's vulnerability to general corrosion. Along this line, Dr. Slater (Defendants' expert) stated: "A valve manufacturer typically manufactures a valve for the broadest spectrum of use." This spectrum would include use in non-chloride environments. Finally, Plaintiffs do not dispute that stainless steel was the prevailing type bolting used by the industry pre-1984, when the valve at issue was manufactured and sold to PPG.

Therefore, Duriron was entitled to summary judgment on Plaintiffs' "material choice" design claim. Accordingly, the district court's refusal to admit that portion of Dr. Morse's affidavit opining that the valve's stainless steel bolting was ~~an unreasona~~bly dangerous design was harmless error.

As noted, the stricken Dr. Morse affidavit recommended a larger crevice. Again, the crevice was the gap between the portions of the valve connected by the stainless steel bolting. As also noted, Plaintiffs contend that, regarding crevice size, Dr. Shelton's deposition established a material fact issue to preclude summary judgment. The relevant colloquy was:

> Q. Did you find any general corrosion?
>
> A. There was plenty of general corrosion on the valve body.
>
> Q. On the bolts.
>
> A. Generally speaking, it looked more like it was crevice corrosion type of -
>
> Q. I'm not familiar with that term. Is crevice corrosion not general corrosion?
>
> A. No, it's not.
>
> Q. What is it?
>
> A. Crevice corrosion is an accelerated corrosion

> mechanism, in which you have *711 a confined space in which the environment cannot be readily flushed or changed.
>
> For example, a gap between the shank of the bolt body and the valve flange, the hole in the back of the valve flange, would be a crevice. That is not an area that's readily accessible, readily changed in the environment that exists.

Unlike Dr. Morse's affidavit (stricken), Dr. Shelton did not recommend in his deposition that the crevice be expanded in order to allow Plaintiffs to more easily observe SCC. Nor did he even mention crevice size in his subsequent affidavit in Plaintiffs' amended opposition to summary judgment. Therefore, Dr. Shelton's testimony is insufficient to preclude summary judgment against the "crevice" portion of Plaintiffs' design claims.

Finally, with regard to crevice size, Plaintiffs contend that the deposition of Defendants' expert, Dr. Slater, precluded summary judgment. Dr. Slater testified that the ideal design

for a valve would have *no* crevice (not a larger one) in order to prevent contact between the bolting and the brine. This testimony does not support Plaintiffs' design defect theory which criticized the *narrowness* of the crevice. Moreover, Plaintiffs' counsel prefaced the pertinent question by saying: "I don't think I'm asking [Dr. Slater] to talk about the design issue, I'm simply asking him the physical question of whether ...[,] if there wasn't a crevice[,] would there be a place for the material to stay in contact with the bolt." Dr. Slater's testimony does not create a material fact issue on this design claim.

B.

[3] Plaintiffs' remaining claim is that Duriron failed to adequately warn PPG against using stainless steel bolting in high-chloride environments when it was reasonably foreseeable that PPG would so use the valves.

> A manufacturer of a product who, after the product has left his control, acquires knowledge of a characteristic of the product that may cause damage and the danger of such characteristic ... is liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

La.Rev.Stat. § 9:2800.57(C).

A manufacturer, however, does not have a duty to warn if "[t]he user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic." La.Rev.Stat. § 9:2800.57(B)(2). Such users are "sophisticated users" or "sophisticated intermediaries." *E.g., Swope v. Columbian Chems. Co.*, 281 F.3d 185, 205-06 (5th Cir.2002). The summary judgment against the failure-to-warn claim was based on PPG's being such a user.

Plaintiffs maintain PPG was *not* a sophisticated user

of stainless steel bolting in high-chloride environments. Essentially, they contend: PPG did *not* know of the danger of stainless steel bolting in such an environment; and, at the very least, Duriron should have warned of that danger in 1984, when it changed its standard Durco T-41 bolting from stainless to carbon steel. (Again, the valve at issue was manufactured and sold to PPG between 1977 and 1983; the injury was in 1998.)

Plaintiffs rely on *Swope*, in which our court reversed a summary judgment awarded a generator manufacturer, rejecting a "sophisticated user" defense. 281 F.3d at 205-11. The manufacturer had claimed plaintiff, a carbon black manufacturer, was a sophisticated user of ozone generators. *Id.* at 190. The generator *712 manufacturer offered two contentions to support its "sophisticated user" defense: (1) because plaintiff had experience with ozone generators, it

should have known of their dangerousness; and (2) because plaintiff was experienced in using ozone to produce carbon black, it should have known of the dangerous characteristics of the ozone generator. *Id.* at 208–09. Our court rejected the latter contention: "The argument begs the question because it bases a conclusion on an assumption that is as much in need of proof or demonstration as the conclusion itself." *Id.* at 209 (internal quotation and alteration omitted). (Our court dismissed the former contention because, although a jury might infer knowledge from experience with the particular generator, it also might not. *Id.* at 208.)

Had Duriron merely contended, similar to the contention in *Swope*, that PPG was a sophisticated user of stainless steel bolting because it had extensively used it in its chemical processing, *Swope* would be apposite. Duriron offered significantly more, however, in support of its defense.

First, PPG's West Virginia plant had rejected stainless steel bolting (also from Duriron) for use in its high-chloride environment since 1969 and had specified carbon steel prior to 1984. Plaintiffs contend this differing behavior by two PPG plants shows PPG was *not* a sophisticated user. To the contrary, it demonstrates that PPG's Lake Charles plant knew, *or certainly should have known,* of such dangers in using stainless steel bolting when it purchased the valve from Duriron, and certainly before Duriron changed the standard bolting on the Durco T-41. Although, in retrospect, PPG's Lake Charles plant may have erred, the fact that another PPG plant specified carbon steel shows that PPG qualified as a sophisticated user of valve bolting.

Second, PPG produced a Teflon coating "intended for use on austenitic stainless and carbon steel to provide protection against ... [SCC]...." In short, PPG was aware of the

danger posed by using non-coated stainless steel bolting in high-chloride environments.

Finally, Haines, PPG's employee, testified that PPG's Lake Charles plant had experienced SCC in stainless steel bolting only six months before Jones' incident. In that earlier incident, the valve involved was also made by Duriron and had been exposed to a higher level of chloride than the valve at issue here. The earlier incident should have put PPG's Lake Charles plant on notice of the danger of such use of stainless steel bolting (as discussed, that plant had known, *or should have known*, of the danger for many years).

Plaintiffs point to language in *Swope* that a user must have known of the danger at the time it purchased the product. First, that language (in a footnote) is *dicta*. *See Swope*, 281 F.3d at 209 n. 81 ("We do *not* base our decision ... on this statutory nuance, however, because there is no

evidence that [the user] ever acquired actual or constructive knowledge of the dangerous characteristic prior to [the incident]." (emphasis added)).

Second, the language in *Swope* was an interpretation of § 9:2800.57(A), which mandates adequate warning for a dangerous item when it leaves the manufacturer's control. Plaintiffs rely instead on § 9:2800.57(C), which requires a manufacturer that learns of the danger *after* the product leaves its control to warn users. The § 9:2800.57(B) "sophisticated user" defense is tied to the general requirement that the manufacturer provide an adequate warning. It stands to reason that, for the "sophisticated user" defense, the time of the user's actual or constructive knowledge is tied to when the duty to warn falls upon the manufacturer. Therefore, at best, *713 Plaintiffs might argue that the *Swope dicta* requires PPG to have had actual or

constructive knowledge of the danger at the time Duriron changed its standard bolting in 1984. As discussed, PPG had such knowledge prior to then.

Finally, Jones contends: even if PPG was a sophisticated user, Duriron is not absolved from shouldering its proportionate share of liability. This contention has no basis in law, *Davis v. Avondale Indus., Inc.*, 975 F.2d 169, 173 (5th Cir.1992) (manufacturer has no duty to warn employee of user that has knowledge of danger); the "sophisticated user" defense, if applicable, protects manufacturers from claims made by the user's employees.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-30582

[Filed October 21, 2003]

United States Court of Appeals,
Fifth Circuit
Appeals from the United States District Court for the
Western District of Louisiana, Lake Charles

ON PETITION FOR REHEARING

Before WIENER, and BARKSDALE, City Judges, and FERGUSON, District Judge*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*District Judge of the Western District of Texas, sitting by designation.